IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT KNOXVILLE
Assigned on Briefs May 22, 2007

STATE OF TENNESSEE v. RICHARD SWINEY

Appeal from the Criminal Court for Sullivan County
No. S51,658 Phyllis H. Miller, Judge

No. E2006-01965-CCA-R3-CD - Filed August 16, 2007

The defendant, Richard Swiney, pleaded guilty in case numbers S49,056; S51,657; and S51,658 to various offenses. He received a four-year suspended sentence in case number S49,056 to run consecutively to the effective six-year sentence in case numbers S51,657 and S51,658. The manner of service for the effective six-year sentence in case numbers S51,657 and S51,658 was determined by the trial court after an evidentiary hearing, and the court ordered the defendant to serve the six years in confinement. The defendant appeals the trial court's order of confinement, and we affirm that order. However, we remand for the correction of several clerical errors in the judgments.

Tenn. R. App. P. 3; Judgments of the Criminal Court are Affirmed and Remanded.

JAMES CURWOOD WITT, JR., J., delivered the opinion of the court, in which JOHN EVERETT WILLIAMS and ALAN E. GLENN, JJ., joined.

Richard A. Spivey, Kingsport, Tennessee, for the Appellant, Richard Swiney.

Robert E. Cooper, Jr., Attorney General & Reporter; Cameron L. Hyder, Assistant Attorney General; H. Greeley Wells, Jr., District Attorney General; and William B. Harper, Assistant District Attorney General, for the Appellee, State of Tennessee.

OPINION

At the plea hearing, the State summarized the proof as follows. In case number S51,658, Department of Correction agents had been investigating the introduction of illegal drugs into the Northeast State Correctional Facility. As a result, several Department of Correction employees were fired, and the agents learned that the defendant was the source of the illegal drugs. On August 21, 2005, an agent learned that Brenda Wilson was going to deliver a package to her incarcerated son from the defendant. Ms. Wilson agreed to cooperate with the agents and set up a meeting with the defendant. On August 26, 2005, Ms. Wilson, who wore a wire and was followed by agents, met with the defendant at a Chevron gas station. After a brief conversation, the agents

moved in and arrested the defendant. They found on his person marijuana, morphine, Alprazolam, and Clonazepam.

As a result of this arrest, the agents obtained a search warrant for the defendant's residence at 1713 King College Road, and they recovered materials which the defendant used to conceal the drugs in packages brought into the prison. The agents also found receipts and money orders from prison inmates. The agents then took the defendant to the Bristol Tennessee Police Department where he admitted guilt and also confessed that he had been growing marijuana on a plot behind his property but that his crop, we discern, had been confiscated.

In case number S51,657, the State's proof would show that on July 25, 2005, a Bristol Tennessee Vice Unit detective received an anonymous call regarding marijuana being grown behind a residence located at 1713 King College Road, the defendant's residence. The detective went to the location and found the marijuana plants. Several weeks later, the detective learned that the defendant admitted that he had been growing marijuana in that area.

At the sentencing hearing, neither the defendant nor the State presented any witnesses. Both parties relied on the presentence investigation report and arguments.

The trial court found that the defendant had no prior criminal record, was honorably discharged from the United States Navy, and had a "good" work history. The trial court also stated that the defendant claimed he smuggled the illegal drugs into the prison to protect his son, who was incarcerated there. The court pointed out that the defendant could have gone to the authorities, and the authorities would have protected his son. In addition, the court found that the defendant was dishonest, stating, "If you will steal you will lie and you're an admitted thief," and the court failed to find that the defendant was genuinely remorseful. The court further found that the nature and circumstances of the defendant's offenses created a dangerous situation in the prison system and "completely subvert[ed] the criminal justice system."

The trial court also applied the enhancement factor that the defendant "was a leader in the commission of an offense involving two (2) or more criminal actors," T.C.A. § 40-35-114(2) (2006), and that during the commission of the offense, the defendant was on bail in case number S49,056, *see id*. § 40-35-114(13)(A). Regarding mitigation, the trial court considered that the defendant had no prior criminal record, was honorably discharged from the Navy, and gave a voluntary confession, *see id*. § 40-35-113(13). The trial court weighed the enhancing and mitigating factors and denied alternative sentencing due to the nature and circumstances of the offenses, the length of time the defendant illegally smuggled drugs into a prison, and the defendant's attitude and untruthfulness.

The defendant appeals the trial court's denial of full probation and any other form of alternative sentencing and claims that the court did not impose his sentence according to statute.

When there is a challenge to the manner of service of a sentence, it is the duty of this court to conduct a de novo review of the record with a presumption that the determinations made by the trial court are correct. T.C.A. § 40-35-401(d) (2006). This presumption is conditioned upon the affirmative showing in the record that the trial court considered the sentencing principles and all relevant facts and circumstances. *State v. Ashby*, 823 S.W.2d 166, 169 (Tenn. 1991). The burden of showing that the sentence is improper is upon the appellant. *Id*. In the event the record fails to demonstrate the required consideration by the trial court, review of the sentence is purely de novo. *Id*. If appellate review, however, reflects that the trial court properly considered all relevant factors and its findings of fact are adequately supported by the record, this court must affirm the sentence, "even if we would have preferred a different result." *State v. Fletcher*, 805 S.W.2d 785, 789 (Tenn. Crim. App. 1991).

The mechanics of arriving at an appropriate sentence are spelled out in the Criminal Sentencing Reform Act of 1989. The court is required to consider (1) the evidence, if any, received at the trial and the sentencing hearing, (2) the presentence report, (3) the principles of sentencing and arguments as to sentencing alternatives, (4) the nature and characteristics of the criminal conduct involved, (5) evidence and information offered by the parties on the enhancement and mitigating factors, (6) any statements the defendant wishes to make in the defendant's behalf about sentencing, and (7) the potential for rehabilitation or treatment. T.C.A. §§ 40-35-210(a), (b), -35-103(5) (2006).

Initially, we note that the trial court properly sentenced the defendant according to the sentencing principles and guidelines set out in the 1989 Sentencing Reform Act, despite the defendant's claim to the contrary. We also note that the defendant was statutorily eligible to serve a suspended sentence. *See* T.C.A. § 40-35-303(a) (2006).

The determination of entitlement to full probation necessarily requires a separate inquiry from that of determining whether a defendant is entitled to a less beneficent alternative sentence. *See State v. Bingham*, 910 S.W.2d 448, 455 (Tenn. Crim. App. 1995), *overruled on other grounds by State v. Hooper*, 29 S.W.3d 1, 9-10 (Tenn. 2000). A defendant is required to establish his "suitability for full probation as distinguished from his favorable candidacy for alternative sentencing in general." *State v. Mounger*, 7 S.W.3d 70, 78 (Tenn. Crim. App. 1999); *see* T.C.A. § 40-35-303(b) (2006); *Bingham*, 910 S.W.2d at 455-56. A defendant seeking full probation bears the burden of showing that probation will "subserve the ends of justice and the best interest of both the public and the defendant." *State v. Dykes*, 803 S.W.2d 250, 259 (Tenn. Crim. App. 1990), *overruled on other grounds by Hooper*, 29 S.W.3d at 9.

Regarding probation, the trial court should consider the nature and circumstances of the offense, the defendant's criminal record, the defendant's background and social history, his present condition, including physical and mental condition, and the deterrent effect on the defendant. *See State v. Kendrick*, 10 S.W.3d 650, 656 (Tenn. Crim. App. 1999). The court should also consider the potential for rehabilitation or treatment of the defendant in determining the appropriate sentence. *See* T.C.A. § 40-35-103(5) (2006). Moreover, in *State v. Bunch*, 646 S.W.2d 158, 160 (Tenn. 1983),

the supreme court held that truthfulness is certainly a factor which the court may consider in deciding whether to grant or deny probation.

In the present case, the trial court found that the defendant lacked candor. Thus, we may dispose of the defendant's claim of full probation in short order. "[L]ack of candor militates against the grant of probation." *State v. Souder*, 105 S.W.3d 602, 608 (Tenn. Crim. App. 2002). In the present case, the trial court's finding of and reliance upon a lack of candor as a basis for denying full probation were palpable and supported in the record. We hold that the defendant failed to establish his entitlement to full probation. *See State v. Kerry D. Hewson*, No. M2004-02117-CCA-R3-CD, slip op. at 9 (Tenn. Crim. App., Nashville, Sept. 28, 2005) (upholding trial court's denial of full probation because of court's finding of defendant's lack of candor).

The defendant in essence argues that the trial court erred in denying him an alternative sentence because the court: (1) failed to properly weigh enhancement and mitigating factors; (2) misapplied the nature-and-circumstances-of-the-offense consideration; and (3) failed to find the defendant was a suitable candidate for community corrections under the special needs category.

The defendant is a standard, Range I offender convicted of Class C, D, and E felonies. As such, he is presumed to be a favorable candidate for alternative sentencing options in the absence of evidence to the contrary. *See* T.C.A. § 40-35-102(6) (2006). However, this presumption does not entitle all offenders to alternative sentences; rather, it requires that sentencing issues be determined by the facts and circumstances presented in each case. *See State v. Taylor*, 744 S.W.2d 919, 922 (Tenn. Crim. App. 1987).

The presumption of favorable candidacy for alternative sentencing in general, which is applicable in the present case, may be overcome by showing that at least one of the conditions set forth in Tennessee Code Annotated section 40-35-103(1) is met. *See, e.g., State v. Jimmy Ray Dockery*, No. E2004-00696-CCA-R3-CD, slip op. at 3 (Tenn. Crim. App., Knoxville, Nov. 30, 2004). These considerations include:

> (A) Confinement is necessary to protect society by restraining a defendant who has a long history of criminal conduct;
>
> (B) Confinement is necessary to avoid depreciating the seriousness of the offense or confinement is particularly suited to provide an effective deterence to others likely to commit similar offenses; or
>
> (C) Measures less restrictive than confinement have frequently or recently been applied unsuccessfully to the defendant.

T.C.A. § 40-35-103(1) (2006).

First, the defendant claims that the trial court improperly weighed the enhancement and mitigating factors, more specifically that the court erred in applying the enhancement factor that the defendant "was a leader in the commission of an offense involving two (2) or more criminal actors." T.C.A. § 40-35-114(2) (2006). At the outset, we note that the court also applied the enhancement factor that the defendant was on bail when he committed the offenses at issue on this appeal and that the defendant admitted that this factor applied. Assuming, *arguendo*, that the trial court erred in applying the factor that the defendant was the leader, upon our de novo review, we find that the admitted enhancement factor still outweighs the possible mitigating factors.

Second, the defendant claims that the "[n]ature and circumstances of the offense[s] [were] not sufficiently egregious to warrant denial of probation or alternative sentencing."

In Tennessee, there is a well-recognized nexus between the "nature and characteristics" of the offense and sentencing to avoid depreciating the seriousness of the offense. The nature and characteristics, or circumstances, of the offense have long been recognized as grounds for denying probation. *Stiller v. State*, 516 S.W.2d 617, 621 (Tenn. 1974); *Powers v. State*, 577 S.W.2d 684, 685-86 (Tenn. Crim. App. 1978); *Mattino v. State*, 539 S.W.2d 824, 828 (Tenn. Crim. App. 1976). The courts have used this rationale for denying probation often in cases of homicide or in other cases in which the offense was violent. *See Kilgore v. State*, 588 S.W.2d 567 (Tenn. Crim. App. 1979); *see also Powers*, 577 S.W.2d at 685-86; *Mattino*, 539 S.W.2d at 828. The nature and circumstances of the offense may serve as the sole basis for denying any probation when they are "especially violent, horrifying, shocking, reprehensible, offensive, or otherwise of an excessive or exaggerated degree; and it would have to be clear that, therefore, the nature of the offense, as committed, outweighed all other factors . . . which might be favorable to a grant of probation." *State v. Travis*, 622 S.W.2d 529, 534 (Tenn. 1981); *see also State v. Cleavor*, 691 S.W.2d 541, 543 (Tenn. 1985), *overruled on other grounds by Hooper*, 29 S.W.3d at 9. Significantly, "[t]his standard has essentially been codified in the first part of T[ennessee] C[ode] A[nnotated] [section] 40-35-103(1)(B) which provides for confinement if it 'is necessary to avoid depreciating the seriousness of the offense.'" *State v. Hartley*, 818 S.W.2d 370, 375 (Tenn. Crim. App.), *perm. app. denied* (Tenn. 1991). Thus, in a proper case, any form of alternative sentencing may be denied solely on the basis of Code section 40-35-103(1)(B) when the nature and circumstances of the offense justify confinement to avoid depreciating the seriousness of the offense, provided that one of the *Travis* qualifiers is present.

The defendant argues that the trial court failed to find that the defendant's conduct was of "a heightened egregious nature." Here the trial court found that because the defendant supplied prison inmates with illegal drugs for profit over a lengthy period of time, he "subvert[ed] the criminal justice system." The court further noted that the inmates who were addicted to drugs prior to going to prison will remain addicted because of the defendant, defeating the potential rehabilitative benefit of the incarceration. Thus, the court, in essence, found the defendant's offenses reprehensible.

To deny an alternative sentence based solely on the seriousness of the offense, the court must find that "'the circumstances of the offense as committed [were] especially violent, horrifying, shocking, reprehensible, offensive or otherwise of an excessive or exaggerated degree,' and the nature of the offense must outweigh all factors favoring a sentence other than confinement." *State v. Grissom*, 956 S.W.2d 514, 520 (Tenn. Crim. App. 1997) (citing *Bingham*, 910 S.W.2d at 454 and *Hartley*, 818 S.W.2d at 374-75). In the present case, the trial court did not solely base its decision on this factor. The court also based the decision on the defendant's attitude and untruthfulness, and in essence, it found that confinement was necessary for rehabilitation. Moreover, the defendant committed the offenses in S51,657 and S51,658 while on bond for S49,056.

Third, the defendant argues that the trial court erred in denying him community corrections because he qualified for the special needs category.

A community corrections sentence is a form of alternative sentencing. *See* T.C.A. § 40-35-104(c)(9) (2006). Although the defendant does meet the minimum eligibility criteria listed in Code section 40-36-106, mere eligibility does not automatically entitle him to be sentenced under the community corrections program. *See State v. Ball*, 973 S.W.2d 288, 294 (Tenn. Crim. App. 1998).

"The Community Corrections Act was never intended as a vehicle through which offenders could escape incarceration." *State v. Grigsby*, 957 S.W.2d 541, 547 (Tenn. Crim. App. 1997). In that respect, a trial court may consider, *inter alia*, a defendant's candor or untruthfulness in denying a community corrections sentence. *See State v. Zeolia*, 928 S.W.2d 457, 463 (Tenn. Crim. App 1996). In our opinion, the trial court's negative assessment of the defendant's candor provides ample support for an incarcerative sentence in lieu of community corrections, regardless of the trial court's additional comment that the defendant did not "have a drug problem that [he] should be sent to community corrections." *See State v. Beverly Dixon*, No. W2004-00194-CCA-R3-CD, slip op. at 10 (Tenn. Crim. App., Jackson, June 30, 2005) (upholding denial of community corrections because trial court's finding of lack of candor). In addition, we do not find persuasive the defendant's argument that his medical conditions and age qualify him for the special needs category.

Based upon the foregoing analyses, we affirm the trial court's judgments; however, we remand for the correction of clerical errors in the judgments. In case number S51,657, the judgment shall state that the defendant pleaded guilty.[1] In case number S51,658, count one, the judgment shall state the additional Code section 39-12-103 as the conviction offense. In count two, the judgment shall state "possession of morphine for resale *or delivery*," under conviction offense. (Emphasis added.) Similarly, in count five, "or delivery" shall be added to the language describing the conviction offense. In count six, the judgment shall state "maintaining a dwelling where a controlled substance is sold *or used*." (Emphasis added.) Finally, count one's judgment in case

[1] The judgment states a plea of nolo contendere although the plea hearing transcript and the plea form state that the defendant pleaded guilty.

numbers S51,657 and S51,658 shall state that these sentences are to be served consecutively to S49,056.

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JAMES CURWOOD WITT, JR., JUDGE